No. 01-99007

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD J. BEARDSLEE, Petitioner-Appellant v. JILL BROWN, Warden of California State Prison at San Quentin, Respondent-Appellee	)	District Court No. C-92-3990-SBA

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC ON CLAIM THIRTY-NINE

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INTRODUCTION

Claim Thirty-Nine alleges that Mr. Beardslee's death sentence is unconstitutional because three of the four special circumstances his penalty jury weighed in aggravation later were invalidated on appeal by the California Supreme Court. As recognized by this Court in *Sanders v. Woodford*, 373 F.3d 1054 (9th Cir. 2004), the jury's consideration of those invalid aggravating factors rendered Mr. Beardslee's death sentence unconstitutional unless the California Supreme Court reviewed the sentence in accordance with *Clemons v. Mississippi*, 494 U.S. 738 (1990). In this case, as in *Sanders*, this Court agreed that Mr. Beardslee's Eighth Amendment rights were further violated by the state court's failure to cure this error on review. Departing from the prejudice framework applied in *Sanders*, however, this Court ruled that the errors were harmless under *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993). *Beardslee*, 2004 WL 3019188, *5, *10 (9th Cir. Dec. 29, 2004).

This ruling warrants rehearing and rehearing en banc for two reasons. First, rehearing en banc is required because application of the *Brecht* prejudice standard, as required by the panel's decision in *Sanders*, is inappropriate given the California Supreme Court's failure to provide the constitutionally mandated review necessary to cure the invalid death sentence. Second, even if *Brecht* applies, rehearing and rehearing en banc is required because this Court rejected the framework for review

recently set forth in *Sanders* and, critically, ignored numerous factors unique to Mr. Beardslee's case that demonstrate that he is entitled to relief under *Sanders*.

Most importantly, rehearing is necessary to permit this Court to consider the effect of invalid special circumstance instructions on the penalty determination. After a jury found Mr. Beardslee guilty and found true two multiple-murder and two witness-killing special circumstances, a new jury was empanelled to decide the penalty. The penalty jury was instructed to accept as true and consider in aggravation the prior jury's special circumstance findings. Because they did not have the benefit of any instructions defining or limiting the special circumstance findings, or even understand the factual basis for the prior jury's determination, the penalty jurors were required to accept the prosecution's "witness-killing" characterization of the crimes as true. The instructions thus impermissibly skewed the penalty determination by according weight to the prosecutor's theory of the aggravating evidence and thwarting fair consideration of defense evidence suggesting that serious mental impairments and fear of other participants better explained, and mitigated, Mr. Beardslee's involvement in the crimes.

Furthermore, these errors occurred in a close penalty trial. The jury initially voted ten to two in favor of life without possibility of parole on both counts, and deliberated for twenty-three hours over four days before finally reaching a verdict. That the jurors struggled with their decision and considered a range of mitigating

factors is evidenced by their notes during deliberations asking what charges had been brought against the other participants in the crimes, and expressing interest in and concern over evidence of Mr. Beardslee's mental illness and its role in their sentencing decision.

Though critical to a prejudice determination under *Sanders*, this Court did not mention or consider the instructions themselves or any of these other facts in reviewing this claim. Instead, the Court justified its decision by examining only whether, absent the invalid special circumstances, the evidence and prosecutor's argument at the penalty trial would have been different. Reliance on these factors – to the exclusion of any consideration of the effect of the actual instructions in the case – conflicts with Supreme Court precedent and the opinions of this Court. Rehearing is necessary to correct this conflict in rulings or reassess this Court's review of such errors. With proper consideration, Mr. Beardslee is entitled to relief from his invalid death sentence.

ARGUMENT

I.

REHEARING EN BANC IS NECESSARY TO ESTABLISH THAT THE *BRECHT* HARMLESS-ERROR STANDARD DOES NOT APPLY TO A *CLEMONS* ERROR

This Court, bound by the decision in *Sanders*, held that the error in Claim Thirty-Nine was not "structural," thus requiring review under the harmless-error standard of *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993). *Beardslee*, 2004 WL 3019188, *7. Mr. Beardslee respectfully submits that rehearing en banc is appropriate to consider and conclude that such errors are not subject to the *Brecht* prejudice analysis.

A capital defendant has an Eighth Amendment right to a sentencing determination that is not infected with unreliable, inaccurate, or irrelevant factors. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 190 (1976); *Beam v. Paskett*, 3 F.3d 1301, 1308 (9th Cir. 1993). Thus, a jury's consideration of an invalid aggravating factor is necessarily an Eighth Amendment violation that invalidates the defendant's death penalty. *See, e.g., Richmond v. Lewis*, 506 U.S. 40, 46, 48 (1992). The Supreme Court further recognizes that an individual suffering an invalid sentence has a constitutional right to have state appellate courts or the original sentencer reweigh valid aggravating and mitigating factors in a new sentencing determination, or to have state appellate courts conduct a harmless error review under *Chapman v. California*, 386 U.S. 18, 23 (1967). *See Clemons*, 494

U.S. at 754. Because the Eighth Amendment does not permit "the state appellate court in a weighing State to affirm a death sentence without a thorough analysis of the role an invalid aggravating factor played in the sentencing process," *Stringer v. Black*, 503 U.S. 222, 230 (1992), the failure of state courts to cure an invalid death sentence is itself an Eighth Amendment error.

The "crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally," *Parker v. Dugger*, 498 U.S. 308, 321 (1991), dictates that the failure of the California Supreme Court to remedy Mr. Beardslee's invalid death sentence is a structural error that may not be cured by federal review. *See Richmond v. Lewis*, 506 U.S. at 49 (to cure an invalid death sentence, "the *state* appellate court or some other *state* sentencer must actually perform a new sentencing calculus.") (emphasis added); *Chapman*, 386 U.S. at 23 ("some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error); *Wiley v. Puckett*, 969 F.2d 86, 94 n.8 (5th Cir. 1992) (federal court may not cure *Clemons* error).

At the very least, when the state court fails to apply the *Chapman* standard in reviewing a jury's consideration of an invalid aggravating factor in a capital case, a federal court may not review that error by a lesser standard than *Chapman*. In *Brecht*, the Court explained that a slightly more lenient prejudice standard is appropriate in the federal habeas context because "it scarcely seems logical to

require federal habeas courts to engage in the identical approach to harmless-error review that *Chapman* requires state courts to engage in on direct review." *Brecht*, 507 U.S. at 636. This reasoning indicates that review is warranted under *Chapman* in a federal habeas court when the state court has failed to apply the rigorous test mandated by *Chapman*. *See Starr v. Lockhart*, 23 F.3d 1280, 1291-92 (8th Cir. 1994) (*Chapman* standard applies on habeas review where lower court reviewed error under less rigorous standard); *see also Hanna v. Riveland*, 87 F.3d 1034, 1038 n.2 (9th Cir. 1996) (noting circuit split on this question). Certainly here, where the state court's failure to apply the rigorous standard of *Chapman* results in an Eighth Amendment error, such reasoning must apply.

II.

REHEARING IS NECESSARY TO CONSIDER THE PREJUDICIAL EFFECT OF INSTRUCTIONS REQUIRING THE JURY TO GIVE AGGRAVATING WEIGHT TO THE INVALID SPECIAL CIRCUMSTANCES.

Applying *Brecht*, this Court determined that Mr. Beardslee was not prejudiced by the jury's consideration of invalid special circumstances by concluding that the jury would have heard the same argument and evidence absent the invalid factors:

> [e]ven if the two witness-killing and one multiple-murder special circumstances had been removed from consideration, as they should have been, the presentation of evidence and argument during the

penalty phase would not have been materially different. Further, the jury's verdict of life without parole for one murder and the imposition of the death penalty for the other indicates that the invalid special circumstance applicable to both crimes did not substantially influence the jury's ultimate verdict.

Beardslee, 2004 WL 3019188, *10.[1] In so concluding, this Court did not address the prejudicial effect that the *instructions* – requiring the jury to accept the three invalid special circumstances as true and give them aggravating weight – had on the weighing process or the unique role the invalid aggravating factors had given the facts of this case.

This reasoning is fundamentally at odds with Supreme Court precedent and the opinions of this Court that require a reviewing court to evaluate error by considering the effect of invalid special circumstance instructions and the special circumstances themselves, rather than the admissibility of evidence related to the special circumstance findings. *See, e.g.*, *Clemons*, 494 U.S. at 754 n.5; *Sanders*, 373 F.3d at 1067. Moreover, this Court's conclusions fail to consider the

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[1] *See also Beardslee*, 2004 WL 3019188, *7 (prosecutor's opening arguments "could have been made to the jury even if the special circumstance verdict had not existed"); *id.* at *8 ("nothing in the prosecutor's closing remarks [] would have been precluded by the elimination of the invalid special circumstance findings"); *id.* at *9 (jury would have heard the prosecution evidence "if the witness-killing special circumstances had been omitted from consideration").

prosecutor's reliance on the invalid special circumstances to improperly inflate the aggravating nature of the crimes and dissuade the jury from giving full effect to the compelling mitigation.

A. WELL-ESTABLISHED CASE LAW REQUIRES THIS COURT TO ASSESS PREJUDICE BY EXAMINING THE LIKELY EFFECT THAT THE JURY INSTRUCTIONS HAD IN THE CONTEXT OF THE CASE.

In *Maynard v. Cartwright*, 486 U.S. 356, 361-62 (1988), the Court held that a jury's consideration of an invalid aggravating factor in a weighing state violates the Eighth Amendment requirement of "individualized sentencing."[2] As the Court later explained in *Stringer*, instructing a jury to "weigh" an invalid aggravating factor, "plac[es] a thumb on death's side of the scale," and creates the risk of unfairly treating the defendant as more deserving of the death penalty. 503 U.S. at 232; *see also Sochor v. Florida*, 504 U.S. 527, 532 (1992).

In determining whether consideration of an invalid aggravating factor is prejudicial, courts are required to determine whether the *instructions* created "a real risk that the jury's decision to impose the death penalty rather than life

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[2] As this Court recognized in *Sanders*, the applicable standard for reviewing the jury's improper consideration of an aggravating factor hinges upon whether a state death sentencing system employs a weighing process. *Sanders*, 373 F.3d at 1059. As the Court held in *Zant v. Stephens*, 462 U.S. 862, 889 (1983), the Eighth Amendment is not implicated by the presence of an invalid aggravating circumstance in a non-weighing state because aggravating circumstances function merely to define eligibility for the death penalty.

imprisonment may have turned on the weight it gave to an invalid aggravating factor." *Sanders*, 373 F.3d at 1062; *see also id.* at 1066 (facts of the case did not render "aggravating circumstance instructions harmless"); *Valerio v. Crawford*, 306 F.3d 742, 762 (2002) (vacating sentence because invalid aggravating circumstance instructions detrimental to jury's proper consideration of defense evidence). Indeed, in *Clemons*, the question was not whether the jury would have heard the same evidence absent the invalid "heinous" aggravating factor, but rather whether the presence of that factor, given Mississippi's weighing formula, impermissibly skewed the jury's decision-making process.[3] 494 U.S. at 754.

Applying this reasoning to the California Supreme Court's holding in *People v. Pensinger* that an "erroneous special circumstance finding was only a 'statutory label' which could not have affected the verdict in light of the evidence properly before the jury," Justice O'Connor found such reasoning "irreconcilable with *Clemons*." *Pensinger v. California*, 502 U.S. 930, 930-31 (1991) (O'Connor, J., joined in dissent from the denial of certiorari by Justice Kennedy). Measuring prejudice in such a manner "makes little sense: *All* jury instruction errors would be

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[3] The Court expressly noted that removing the invalid factor would not change the evidence before the jury. *Clemons,* 494 U.S. at 754 n.5 ("in this case there is no serious suggestion that the State's reliance on the 'especially heinous' factor led to the introduction of any evidence that was not otherwise admissible in either the guilt or sentencing phases of the proceeding. All of the circumstances surrounding the murder already had been aired during the guilt phase of the trial and a jury clearly is entitled to consider such evidence in imposing sentence.").

harmless under this reasoning, because none of them add to or subtract from the evidence considered by the jury." *Id.* at 931 (emphasis in original).

In *Sanders*, this Court correctly eschewed a prejudice analysis premised upon the admissibility of evidence and prosecutor's argument before the sentencing jury. *Sanders*, 373 F.3d at 1067 ("[e]ven assuming that ... on the facts of this case, the jury could still have considered the 'substance of the evidence' that led it to find true the invalid special circumstances," a court may still "have grave doubt as to whether it would have imposed death absent the special-circumstance label"); *see also id.* at 1063, 1066-67 (finding prejudice despite the lack of prosecutorial emphasis on the circumstances).[4]

B. A PROPER ANALYSIS OF THE EFFECT OF THE JURY INSTRUCTIONS IN THIS CASE DEMONSTRATES THAT MR. BEARDSLEE WAS PREJUDICED BY THE PRESENCE OF THREE INVALID SPECIAL CIRCUMSTANCES.

In the context of this case, instructing the new penalty jury to accept the invalid special circumstance findings as true and consider them as aggravation had a substantial and injurious effect.[5] From the first moment of the penalty trial, the

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[4] *See, e.g., Francis v. Franklin*, 471 U.S. 307, 325 n.9 (1985) ("we adhere to the crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions"); *Payton v. Woodford*, 346 F.3d 1204, 1218 (9th Cir. 2003) (invalid instruction on sentencing factor prejudicially constrained sentencing jury's ability favorably to weigh and give consideration to mitigating evidence).

[5] In applying *Brecht*, "[w]hen a federal judge in a habeas proceeding is in

jurors were informed that the guilt jury had determined that Mr. Beardslee committed the crimes because the victims had witnessed a shooting in his apartment. At the close of the penalty phase, the jury expressly was instructed to accept the witness-killing special circumstances as true and consider them as aggravating factors in determining whether to sentence Mr. Beardslee to death:

> The charge that these murders were committed with special circumstances of multiple murders and killing witnesses to a crime have been specifically found to be true. Supplemental Excerpts of Record ("SER") 155.

The jury further was instructed that it was to "consider, take into account and be guided by" several factors including the invalid special circumstances, and weigh the aggravating factors against the mitigating factors in determining whether to sentence Mr. Beardslee to death. SER 155-57.

As this Court consistently has recognized, these "aggravating factors serve to 'direct the sentencer's attention to specific, provable, and commonly understandable facts about the defendant and the capital crime that might bear on

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grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict, that error is not harmless." *O'Neal v. McAnich*, 513 U.S. 432, 436 (1995). Moreover, as this Court recognized, relief is required unless there is a "fair assurance" that no juror was improperly influenced by the invalid aggravating circumstance. *Valerio*, 306 F.3d at 762.

[the defendant's] moral culpability.'" *Allen v. Woodford*, 366 F.3d 823, 855 (9th Cir. 2004) (quoting *People v. Bacigalupo*, 6 Cal.4th 457, 476 (1993)). Thus, in California's weighing system, where the jury may "accord as much or as little weight to any particular aggravating factor, the mere finding of an aggravating factor cannot but imply a qualitative value to that factor." *United States v. McCullah*, 76 F.3d 1087, 1112 (10th Cir. 1996).

In addition to improperly increasing the number of aggravating factors,[6] the presence of the invalid special circumstances and the effect of the court's instructions impermissibly gave elevated legal weight to the prosecution's aggravating theory of the crime – that the murders were committed by a cold, calculating killer – and thwarted the jury's consideration of compelling mitigation – that the crime was out of character and the product of Mr. Beardslee's mental impairments and fear for his own life. Without instructions defining and limiting the witness-killing special circumstance findings, the jury was free to identify any evidence of "witness-killing" and weigh it as true against other competing evidence. For the newly empanelled jury, the instruction inevitably meant accepting, without reflection, the prosecutor's expansive, aggravated view of the

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[6] The prejudicial effect of erroneous instructions was exacerbated because *three* of the four special circumstances should never have been considered and weighed, thus creating "a real risk that the jury's decision to impose the death penalty rather than life imprisonment may have turned on the weight it gave to an invalid aggravating factor." *Sanders*, 373 F.3d at 1062.

facts.

During Mr. Beardslee's penalty trial, the defense attempted to present many mitigating aspects to the crimes but the legal weight of the invalid special circumstances combined with the unique situation of a separate penalty jury negated their effect. For example, accepting the witness-killing special circumstances as true required the jury to reject evidence that Mr. Beardslee's involvement in the crimes resulted from his overwhelming fear that Frank Rutherford, a primary architect of the crimes, would kill him, or have him killed, if he did not participate in the murder of the two victims, Patty Geddling and Stacy Benjamin. *See, e.g.*, SER 82-3, 103, 201, 202. This was a central defense theme during the penalty phase, *see* SER 132-33, 135-40, and one the prosecutor attacked incessantly, and exclusively, by reference to the witness-killing theory, *see e.g.,* SER 79, 108-09, 112, 114, 116, 127, 143-42.

Required to accept the witness-killing theory as true, the jury also could not fully consider, and give mitigating weight to, evidence that established Mr. Beardslee's role in the crimes as passive and reactionary, rather than deliberate and planned. Evidence presented during the penalty phase indicated that Mr. Beardslee was a hapless, unwilling "patsy" for the other participants. *See* SER 82, 134, 139, 141, 171, 186, 190. This evidence, however, was countered by the prosecutor's extensive reliance on the witness-killing theory. In cross-examining Dr.

Wilkinson, the mental health expert for the defense, the prosecutor repeatedly pressed the doctor with questions such as, "[H]is conduct ... was indicative of someone who was trying to cover up the crime that occurred in his apartment, wasn't it?" SER 106.

The requirement to accept the witness-killing motive as true similarly precluded the jury from fully considering the other primary mitigating factor, Mr. Beardslee's mental impairments. The defense argued that Mr. Beardslee's participation in the crimes "goes back to things that we know about Don, his lack of resource, his lack of judgment, his lack of insight into what is going on." SER 139. This explanation was supported by Dr. Wilkinson's testimony and by accounts of Mr. Beardslee's behavior over the course of the crimes.[7] To rebut, the prosecutor relied on the witness-killing motive in a vehement and extensive cross-examination of Dr. Wilkinson. In all, the prosecutor challenged the defense expert *twenty-three times* by asserting the witness-killing theory of the crime as an alternative to each of the doctor's mitigating observations. *See, e.g.,* SER 107; 113; 115.

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[7] A co-participant, Ricki Soria, noted his detachment. SER 200 (describing blank feeling during the crimes); 181 (during the crimes he was "very, very quiet. ... Really strange. I had never seen him that way."); 176 (as the crime was unfolding, Donald Beardslee "was in his own little world, you know, just staring off into space."). Donald Beardslee echoed her observation, testifying that he had "no thoughts at all, ... just a blank." SER 195; *see also id.* ("I wasn't thinking of what was going on.").

Finally, the invalid special circumstances and accompanying instructions were particularly prejudicial given the closeness of the case. Notes submitted by the jury during its deliberations demonstrate the difficulty it had determining the degree of culpability to attribute to Mr. Beardslee and the compelling nature of the mitigation case, particularly with respect to the evidence of Mr. Beardslee's mental problems. The jury submitted eight notes during the penalty phase. *See* SER 203-13. One of the notes specifically asked about the relative charges and punishments the other participants in the crimes received. *See* SER 213. Four of the notes indicated concern about psychological or psychiatric issues, and a fifth note asked for copies of Mr. Beardslee's prior prison reports, an exhibit that repeatedly highlighted Mr. Beardslee's mental impairments. *See* SER 204, 208, 210, 211.

Contrary to the Court's speculative justification for finding error harmless, the jury's split verdicts indicate that the aggravating evidence was not overwhelming and instead that this was a close case. This more logical inference is supported by the length of deliberations of twenty-three hours over the course of four days and an initial vote of ten to two for a life verdict on both counts before reaching its verdicts. *See* SER 214-19.

III.

REHEARING IS NECESSARY TO CORRECT THIS COURT'S INACCURATE ASSUMPTIONS ABOUT THE PROSECUTOR'S RELIANCE ON THE INVALID SPECIAL CIRCUMSTANCES.

In this case, prejudice from the instructions to the jury to accept the witness-killing special circumstances as true and weigh them as aggravation was exacerbated by the central role that theory played in the prosecutor's case. For this reason, it is important to correct the Court's inaccurate characterizations of the witness-killing evidence as minimal and of other aggravating facts as more significant.

In portraying the witness-killing special circumstances "and related matters" as not significant, the Court states that the prosecutor's opening statement "centered around other aspects of the case." *Beardslee*, 2004 WL 3019188 at *7. To be sure, the prosecutor focused some of argument on the details of Mr. Beardslee's prior murder plea and the nature of the charged killings themselves. The insidious nature of the invalid witness-killing theory was such, however, that most arguments – including argument that the crimes were "cold-blooded" or showed "evilness," "depravity," or "callousness," – necessarily related to the prosecutor's repeated reference to a cold and calculated motive for the crimes: "fear of being caught by the police for what happened in his apartment ... animated the defendant. That's what he was doing, getting rid of evidence, not

only physical evidence, ... but the women who were shot in the apartment and knew about the rip-off." *See* SER at 79.[8] Thus, this Court's *Brecht* analysis suffers from a failure to consider the legal and factual effect that the invalid special circumstances had on the jury's *view* of the evidence and the prosecution's case.

Furthermore, the Court's citation to arguably more inflammatory argument that "Beardslee acted alone when he killed Geddling," is plainly mistaken. *Beardslee*, 2004 WL 3019188 at *7. Evidence established that Bill Forrester and Ricki Soria were present when Patty Geddling was killed and that Bill Forrester fired the first shots. *See, e.g., Beardslee v. Woodford*, 358 F.3d 560, 565 (9th Cir. 2004). Neither the guilt nor penalty phase jury ever determined who fired the fatal shots. *See People v. Beardslee*, 53 Cal. 3d 68, 90 (1991) ("Each of defendant's two convictions of first degree murder could have been based on either of two findings: that he was the actual perpetrator or that he was an aider and abettor."); *id.* at 93 (same).

This Court's conclusion was further supported by the false belief that during

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[8] *See also* SER 75 (there were "many acts where the defendant was trying to cover up or destroy evidence of what had happened in his apartment"); 76 ("Stacey was now a witness to not only what happened in ... the apartment but also to the events leading up to Patty's murder."); 77 (he "took great pains in disposing of all the evidence of a crime that occurred in his apartment ... because he was on parole for murder at the time."); 78 ("Of course, he got rid of Stacey Benjamin and Patty Geddling by murdering them. Thus the special circumstance of murdering witnesses").

argument "the prosecutor all but abandoned the witness-killing theory as a rationale for imposing the death penalty." *Beardslee*, 2004 WL 3019188 at *8. Indeed, the prosecutor significantly referred to the witness-killing special circumstances and his witness-killing theory for motive during his closing argument.[9] In his rebuttal, the prosecutor returned to these themes, again citing

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[9] *See, e.g.*, SER 119 ("[n]ot every first degree murder ends in a penalty phase such as this one, only special kinds of first degree murders with special circumstances results in a penalty phase."); 120 ("only those first degree murders with special circumstances found to be true warrant the possibility of a death penalty"); 120 (reminding jury that the prior jury determined "Patty Geddling and Stacey Benjamin were murdered by the defendant because they were witnesses to crimes that took place in the defendant's apartment."); *id.* ("The murder of either girl with the killing of a witness special allegation in and of itself would have resulted in this penalty phase, but we have two here. Two victims, two special circumstances for each."); *id.* ("The previous jury that sat in judgment on the defendant for his guilt of two first degree murders found ... the existence of two special circumstances as to each one."); 120-21 (noting the "callousness with which the defendant coolly and deliberately carried out his scheme to murder Patty Geddling and Stacey Benjamin justify" the death penalty); 123 ("Patty Geddling and Stacey Benjamin were eliminated as witnesses."); 127 ("The only fear he had, as I told you about, is the fear of detection by the police."); 129 ("Nevertheless, Beardslee's position – you can have, obviously different motivations for why different people are doing things. Defendant's motivation was to avoid going back to prison on a parole violation from being discovered, having people commit crimes in your apartment. He gets rid of the evidence. That included Patty Geddling and Stacey Benjamin."); 130 ("[y]ou will be told that you are to consider, weigh and be guided by the circumstances of the crimes and the special circumstances, what the defendant did, why he's in this pickle he's in now"); 131 (discussing Cal. Penal Code section 190.3(f) – whether the defendant reasonably believed there was a moral justification or excuse for the crime – the prosecutor argued that "[t]here is no reasonable basis for it and there certainly is no moral justification or extenuation for the brutal murder of these young girls because you only act as a witness. That's an aggravating, the fact that it's missing.").

Mr. Beardslee's alleged "fear of detection," SER 144, and characterizing his care for Patty as another calculating tactic, stating "sure he's trying to stop the bleeding so there wouldn't be any more evidence of it. The reason he was in with Patty is to make sure she didn't start talking to people." SER 145.

The Court's reduction of the influence of invalid circumstances to a count of "little over 500 transcript lines" also misrepresents the powerful role that *motive* played in the penalty trial and the devastating effect of the requirement that the jury accept as true the invalid witness-killing aspect of the crimes.[10] The prosecution witness-killing motive hinged on evidence that Patty Geddling had first been shot in Mr. Beardslee's apartment, that someone cleaned up the apartment afterward, that the killings happened after the initial shooting, and that evidence from the killings had been disposed of in various locations. In other words, nearly all of the prosecution case included evidence of motive that improperly was bolstered by the effect of the invalid special circumstances and instructions.

Similarly extensive was the defense case that attempted to establish an

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[10] Contrary to the Court's representation, Dr. Wilkinson's testimony alone, which the Court cites as specifically addressing the motive for the crimes, spans 136 pages and some 3,500 lines. This testimony also occurred at the very end of the penalty trial. The prosecutor's cross-examination incessantly raising witness-killing as the motive came at the end of that testimony, leaving one of the final impressions on the penalty jury.

alternative explanation for the crimes. In addition to Dr. Wilkinson's testimony, the defense case in the penalty trial focused on countering the witness-killing theory by raising Mr. Beardslee's fear of Frank Rutherford, his lesser role in the murders, and his mental impairments. *See, e.g.,* SER 132-33, 135-40.

IV.

REHEARING IS NECESSARY BECAUSE THE COURT'S RULING IS INCONSISTENT WITH STANDARDS THAT LIMIT THE SPECULATION A REVIEWING COURT MAY EMPLOY WHEN EVALUATING THE EFFECT OF ERROR ON A CAPITAL JURY'S PENALTY VERDICT.

This Court in *Sanders* stated that "[w]e cannot know as an appellate court what individual weight a juror assigned to a finding of an aggravating special circumstance. Thus we may not simply assume harmless error because of the presence of other aggravating circumstances or the absence of mitigating ones." 373 F.3d at 1066.[11] Instead, *Sanders* identified three objective factors that govern whether it could "easily ascertain what led the jury to impose death." 373 F.3d at 1066 n.6. The Court looked for evidence that the jury may have had doubts about the defendant's role in the crimes, including questions about who delivered the fatal blow and the extent to which the killing was pre-planned; the existence of

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[11] The Court also pointed out that under the California death penalty statute, "individual jurors may ascribe varying weight to any single aggravating factor. This makes it difficult for an appellate court that later reviews the jury's sentencing decision to surmise what weight the jury gave to a particular factor." 373 F.3d 1062.

aggravating factors that overwhelmingly compelled a death sentence; and overt signs that the case was close. 373 F.3d at 1066-67.

This Court failed to abide by these guidelines, and instead focused on the jury's split verdict, opining that "[t]he most logical explanation for the split verdict is that the jurors considered the mitigating factors significant as to the crime in which Rutherford was present, but did not consider those factors sufficiently mitigating for Geddling's murder, when Rutherford was absent." *Beardslee*, 2004 WL 3019188 at *9. This approach also conflicts with *Williams v. Calderon*, 52 F.3d 1465 (9th Cir. 1995), in which this Court rejected the district court's harmless error ruling where its view of the evidence was "one plausible explanation for Williams' actions [but] by no means the only one." 52 F.3d at 1476; *see also Valerio*, 306 F.3d at 763 (finding prejudice when a single member of the jury could have found in favor of Valerio absent the invalid aggravating circumstance).[12]

"If the jury's weighing process is infected by [error], the legitimacy of an ensuing death sentence should not hinge on ... the reviewing court's speculation about the decision the jury would have made absent the infection." *Jones v. United States*, 527 U.S. 373, 421-22 (1999) (Ginsburg, J., dissenting).

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[12] At oral argument, respondent conceded that speculation regarding the motivation for the jury to return the life verdict for the Benjamin murder was inappropriate.

V.

REHEARING IS NECESSARY TO PERMIT THIS COURT TO CONSIDER CUMULATIVE ERROR.

The Court failed to analyze the cumulative prejudice flowing from the multiple constitutional errors infecting the trial. *See Alcala v. Woodford*, 334 F.3d 862, 883 (9th Cir. 2003). Although finding error in the initial appeal under *Griffin v. California*, 380 U.S. 609 (1965), and grappling with the extent to which the trial judge's inappropriate response to jury notes diminished the consideration of petitioner's potential for rehabilitation, *Beardslee*, 358 F.3d at 586-87, 590-91, the Court did not reconsider the prejudicial effect of these and other errors in conjunction with its review of the *Clemons* errors.[13]

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[13] The *Davenport* error, *People v. Beardslee*, 53 Cal.3d at 112-13, as well as trial counsel's failure to call Frank Rutherford to the stand when entitled to do so, *see People v. Ford*, 45 Cal.3d 431, 440 (1988), also should have been factored into a cumulative prejudice analysis.

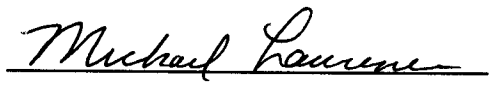
CONCLUSION

For the foregoing reasons, this Court should grant rehearing in this case

Dated: January 5, 2005

Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

By: 

MICHAEL LAURENCE
Attorneys for Petitioner
DONALD JAY BEARDSLEE

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 40 and 9th Cir. R. 40-1, the attached Petition for Rehearing and Suggestion for Rehearing En Banc on Claim Thirty-Nine is proportionally spaced, has a typeface of 14 points or more (14-point Times New Roman/Microsoft Word) and contains under 4,200 words (4,188 words).

Dated: January 5, 2004

By: Michael Laurence

Michael Laurence
HABEAS CORPUS RESOURCE CENTER
Attorney for Donald Jay Beardslee

PROOF OF SERVICE

I, Nancy Torpey, declare that I am a citizen of the United States, employed in the City and County of San Francisco, I am over the age of 18 years and not a party to this action or cause, my current business address is 50 Fremont Street, Eighteenth Floor, San Francisco, California 94105.

On January 5, 2004, I served a true copy of the following document:

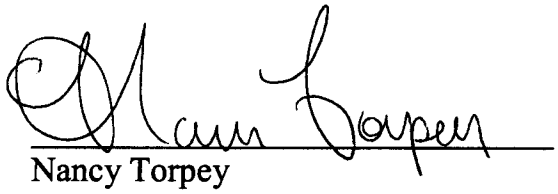
PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC ON CLAIM THIRTY-NINE

on the following by electronic means, as agreed to by the parties, and by placing true copies in a sealed envelope, with first class postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as follows:

DANE R. GILLETTE
SR. ASST. ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
455 GOLDEN GATE AVENUE, SUITE 11000
SAN FRANCISCO, CA 94102

STEVEN S. LUBLINER
P.O. BOX 750639
PETALUMA, CA 94975

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 5, 2004.



Nancy Torpey